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NO. 60538-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ISIAH HALL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Richard D. Eadie, Judge

BRIEF OF APPELLANT

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RULES, STATUTES AND OTHERS

A. ASSIGNMENTS OF ERROR

1. Appellant's multiple convictions for witness tampering violate the prohibition against double jeopardy.

2. Appellant received ineffective assistance of counsel.

Issues Pertaining to Assignments of Error

1. Do appellant's multiple convictions for witness tampering violate double jeopardy, where the separate convictions are based on a course of conduct involving a single witness for a single proceeding? (Assignment of Error 1)

2. Did appellant receive ineffective assistance of counsel at his trial where his attorney failed to object to inadmissible and prejudicial evidence depicting him as a repeat offender and therefore more likely to have committed the instant offenses? (Assignment of Error 2)

B. STATEMENT OF THE CASE

Following a jury trial in King County Superior court, Isiah Hall was convicted of one count of first degree burglary, one count of second degree assault, one count of second degree unlawful possession of a firearm, and three counts of tampering with a witness. CP 75-84. The jury also found by special verdict that Hall was armed with a firearm at the time of the

burglary. CP 67. The jury acquitted Hall of one count of assault in the second degree and one count of tampering with a witness. CP 64, 70.

1. Facts Pertaining to Witness Tampering Charges

The charges for tampering with a witness stem from communications between Hall and Desirae Aquiningoc while Hall was in jail prior to his trial. CP 13-14. The charges that resulted in guilty verdicts, counts 6, 7 and 8, are detailed as follows. Count 6 charges that Hall "on or about March 22, 2007, did attempt to induce a witness Desirae Aquiningoc . . . to testify falsely or . . . withhold any testimony or absent herself [from the trial]." CP 13. Counts 7 and 8 make the same allegations, with the dates of "on or about March 30, 2007" and "on or about April 4, 2007," respectively. CP 14.

At trial, Aquiningoc testified that Hall called her from the jail telephone "[a]t least five times a day," and "almost every day."[1] 3RP 384. Aquiningoc also visited Hall at the jail on several occasions. 3RP 391, 399, 400, 402. Aquiningoc testified that Hall did not want her to come to court, and directed her to stay at his mother's house instead of going to court.

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[1] The Reports of Proceedings (RP) are as follows:
1RP = May 16 & 17, 2007
2RP = May 21 & 22, 2007
3RP = May 23, 2007
4RP = May 24, 2007
5RP = May 29 & July 30, 2007.

3RP 388. Aquiningoc claimed that Hall told her what to say if she did testify, however:

> He wanted me to make up a story about where the gun -- who owned the gun. He wanted me to say it was a friend's of mine, and that he found it, and that he took it because he wanted to go and sell it.

3RP 392. Aquiningoc testified that, at some point, Hall instructed her to "[put] the subpoena that I got back into the mailbox," and to "go on a trip" so that the prosecutor "could not find me." 3RP 399-400.

While Aquiningoc was testifying, the state played recordings of the telephone calls between Hall and Aquiningoc while Hall was in jail prior to trial.[2] Exhibits 22 and 23. The jurors were provided with a transcript of the calls. Exhibit 24. The prosecutor occasionally stopped the playback of the recording and questioned Aquiningoc about the recorded conversations.

During closing argument, the prosecutor explained which statements formed the basis of each of the four witness tampering counts. The statements for the charges that resulted in guilty verdicts are as follows. As to count 6, on March 22, 2007, Hall allegedly told Aquiningoc: "You

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[2] The calls were recorded by the jail where Hall resided, a standard procedure. On every separate call, the parties to the call received a warning that the call would be recorded. The recording procedure does not present any issue in this appeal.

might have to do something for me . . . to get me out of here," and, "Everything I [have been] telling you to do I mean you know you gotta do it though baby okay?" Ex 24, at 5, 8; 5RP 623. As to count 7, on March 30, 2007, Hall allegedly told Aquiningoc to "go on a vacation for a minute." Ex 24 at 14; 5RP 623. As to count 8, on April 4, 2007, Hall allegedly told Aquiningoc: "Don't come to court." Ex 24 at 15; 5RP 623.

2. Facts Pertaining to the Other Alleged Offenses

The burglary, assault, and firearm charges stem from actions alleged to have occurred on the night of January 14, 2007.[3] CP 11-12. On that night, Hall was alleged to have gone to the home of Mellissa Salazar, pointed a revolver at Salazar, entered Salazar's home without permission, and chased LaMont McKinney out of the home and down to the building's parking lot. CP 11-12.

After Hall was arrested and given Miranda[4] warnings, he made a statement to King County Sheriff Detective John Pavlovich. 1RP 43-46. The trial court held these statements to be admissible, following a CrR 3.5 hearing. 1RP 62.

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[3] Hall stipulated that he had a prior qualifying conviction for the firearm charge. CP 12-13, 24.

[4] Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

In his statement, Hall admitted that he went to Salazar's apartment on the day in question and that McKinney was there. 1RP 49. He explained that he was upset with Salazar and argued with her because she infected him with a sexually transmitted disease. 1RP 49. However, Hall denied that he was armed, or that he threatened or assaulted anyone. He stated that he did not own a revolver, or keep one in the house where he lived with Aquiningoc. 1RP 49. Hall did not testify at trial.

Salazar's account of the evening in question was inconsistent with her prior statement to investigating police officers, in several respects. 2RP 174-270. For instance, she was inconsistent about whether Hall pushed her to the ground before entering her house. 2RP 256-58. She also gave inconsistent statements regarding the time of day that she allegedly received a threatening phone message from Hall on the day of the alleged burglary and assault. 2RP 240. Finally, she also contradicted McKinney when she described using one of his two cell phones to speak to him shortly after Hall left the apartment complex. 2RP 246-47.

3. Trial Court's Spontaneous Request for a Sidebar Conference

There were several instances during the trial when Hall's criminal history was referenced or suggested. 4RP 498, 502. There was also one instance in which a police detective showed the jury inadmissible evidence.

4RP 514. Although Hall's trial counsel did not object, the court was so concerned that it requested a sidebar conference. 4RP 516. Mostly, the trial court's concern had to do with Detective Pavlovich's testimony. 4RP 516-21.

Detective Pavlovich testified that before he arrested Hall, he showed Aquiningoc a "booking photo" of Hall to identify him before his arrest. 4RP 498. The detective also testified that there were "some warrants" in existence that would have allowed them to arrest Hall. Although Hall's trial counsel did not object, the prosecutor asked the trial court to strike the reference to the warrants--a request that the trial court granted. 4RP 502. Most troubling to the trial court, Detective Pavlovich pulled a bullet cartridge out of his pocket and showed it to the jury. The bullet was not marked as an exhibit, offered as evidence, or admitted as evidence. 4RP 514.

Ironically, the defense itself also submitted evidence suggesting Hall's criminal background. During King County Sheriff Deputy David Keller's testimony, defense counsel sought to establish that Hall did not live in Aquiningoc's apartment by admitting photographs of court documents pertaining to Hall found at Aquiningoc's apartment, but listing a different mailing address for Hall. 4RP 473-474. The documents that appear in the

photograph are court documents from a previous criminal case against Hall, and include the phrase "defendant shall be released from jail." 4RP 518; Ex 33.

At a break in the testimony, the trial court, *sua sponte*, called for a sidebar conference. 4RP 516. At the side bar, the trial court expressed its concern with the reference to the "booking photo,"[5] the mention of Hall's prior warrants, and Detective Pavlovich's use of the bullet cartridge during his testimony.[6] 4RP 516-21. Speaking of the "booking photo" reference, the court stated, "it introduces a suggestion that the defendant has been in jail before, and it puts in clearly inadmissible evidence." 4RP 518. Speaking of the detective's display of the bullet cartridge, the court stated:

> The bullet was displayed to the jury. I will say for the record that the witness sits to my left. The witness apparently pulled it out of his left pocket, and was shielding it from my view when he was showing it. I had no idea that it was being shown until you brought it to my attention by directing a question to him.

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[5] In a similar vein, when McKinney's testified, he mentioned a "restraining order" Salazar allegedly had against Hall. 3RP 285. Hall's trial counsel did not object or seek any relief.

[6] In addition to failing to object to Detective Pavlovich's display of the bullet cartridge, Hall's trial counsel also failed to object when Pavlovich testified that, as a result of his initial investigation, "I determined that several crimes occurred." 4RP 490.

> Under the circumstances of this case, I have an abiding belief that that was not an accident. I think he is a very smart, intelligent man testifying, very experienced. He knows that. And I am really concerned when any witness comes in and intentionally tries to evade what are known or should be known rules in court. There is nothing shown to that jury that doesn't go through a process that allows both sides to comment on it first, and the Court makes a ruling. Nothing is shown to the jury other than through that process.

4RP 519. During the sidebar, the prosecutor raised the issue of Hall's trial counsel's use of the photograph of Hall's court documents. 4RP 518, 521.

The trial court expressed its opinion that a mistrial was not warranted at that time. 4RP 520. However, Hall's trial counsel raised no such motion and made no argument on the issue.

C. ARGUMENT

1. HALL'S MULTIPLE CONVICTIONS FOR TAMPERING WITH A WITNESS VIOLATE DOUBLE JEOPARDY BECAUSE THE CHARGES ALL RESULT FROM A SINGLE COURSE OF CONDUCT.

Hall was convicted of three counts of tampering with a witness based on his conversations with Aquiningoc on March 22 and 30 and April 4, 2007. Because the unit of prosecution under the tampering with a witness statute is a course of conduct directed towards a witness or person in relation to a specific proceeding, Hall's convictions for three counts of

tampering with the same witness and relating to the same proceeding violate his right to be free from double jeopardy.

Under the double jeopardy provisions of the United States and Washington constitutions, a defendant may not be convicted more than once under the same criminal statute if only one unit of the crime has been committed. U.S. Const. amend. V; Const. art. I, § 9; State v. Leyda, 157 Wn.2d 335, 342, 138 P.3d 610 (2006); State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005); citing State v. Westling, 145 Wn.2d 607, 610, 40 P.3d 669 (2002). The unit of prosecution is designed protect to the accused from overzealous prosecution. State v. Turner, 102 Wn. App. 202, 210, 6 P.3d 1226 (2000).

The unit of prosecution may be an act or a course of conduct. Tvedt, 153 Wn.2d at 710 (citations omitted). The unit of prosecution, or the punishable act under the statute, is determined by examining the statute's plain language. Leyda, 157 Wn.2d at 342; Westling, 145 Wn.2d at 610. The construction of a statute is a question of law that this Court review de novo. State v. Martin, 137 Wn.2d 774, 788, 975 P.2d 1020 (1999). Statutes should be construed to effect their purpose and to avoid strained, unlikely, or absurd consequences. State v. Neher, 112 Wn.2d 347, 351, 771 P.2d 330 (1989). A statute is ambiguous if it can reasonably

be interpreted in two or more ways, but it is not ambiguous simply because different interpretations are conceivable. State v. Keller, 143 Wn.2d 267, 276-77, 19 P.3d 1030 (2001).

If the legislature has failed to specify the unit of prosecution in the statute, or if its intent is not clear, this Court resolves any ambiguity in favor of the defendant. Tvedt, 153 Wn.2d at 711.

In RCW 9A.72.120, the legislature defines the crime of tampering with a witness, in relevant part, as follows:

> (1) A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding or a person whom he or she has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child to:
>
> (a) Testify falsely or, without right or privilege to do so, to withhold any testimony; or
>
> (b) Absent himself or herself from such proceedings[.]

To summarize, the statute's prohibited conduct is the attempt to induce a witness to do any one of the listed acts (withhold information or testimony, testify falsely or absent himself or herself) where there is a reason to believe the person has relevant information or will be a witness in a specific proceeding.

The legislature evidently found, and this finding is one in which the courts have consistently concurred, that attempts to influence a witness to change his testimony or to absent himself from a trial or other official proceeding, necessarily have as their purpose, and naturally tend, to obstruct justice. State v. Stroh, 91 Wn.2d 580, 582, 588 P.2d 1182 (1979).

The statute focuses on the *specific witness* and the *specific proceeding*. Under the statute's plain language, the use of the term "a witness or person" contemplates *a single individual.* The language "any official proceeding"[7] and "such proceeding" means *the specific proceeding* where the person who the accused is attempting to induce may be called as a witness or has relevant information.

The statute also defines in the alternative the types of acts that an accused is prohibited from attempting to induce the witness to do. But, whether an accused attempts to induce the witness to give false testimony, withhold relevant information, withhold testimony or absent herself or do

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[7] RCW 9A.72.010(4) defines official proceeding as follows:

> A proceeding heard before any legislative, judicial, administrative, or other government agency or official authorized to hear evidence under oath, including any referee, hearing examiner, commissioner, notary, or other person taking testimony or depositions.

any combination of the above, or makes more than one attempt to induce the witness to commit one or more of the above acts, the intent is still the same--to obstruct justice in the specific proceeding.

Moreover, the purpose of the statute is to punish the attempt to obstruct justice in a specific proceeding. Whether an accused succeeds in his attempts to induce a witness to do one or all of the statute's listed prohibited acts in relation to a proceeding, *there is only one end result*, which is the obstruction of justice.

Therefore, under the statute's plain language and consistent with the legislative purpose, the statute proscribes a course of conduct and the unit of prosecution is per person per official proceeding.

The state cannot skirt double jeopardy protections by breaking a single crime into temporal or spatial units. State v. Adel, 136 Wn.2d 635, 965 P.2d 1072 (1998) (citing Brown v. Ohio, 432 U.S. 161, 169, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977)).

Although there is evidence that Hall attempted to induce Aquiningoc to do one or more of the statute's listed acts (i.e. testify falsely, absent herself, or withhold relevant information) in relation to the proceeding against him, he committed only one offense because the statute describes a course of conduct. The unit of prosecution is not based on when each

attempt was made. The unit of prosecution is one offense per person per official proceeding. It does not matter how many different times Hall attempted to induce Aquiningoc to do any one of the acts listed in the statute, his intent to obstruct justice in the proceeding against him never changed.

Alternately, if the statutory language can reasonably be interpreted in more than one way, it is ambiguous. State v. Keller, 143 Wn.2d 267, 276-77, 19 P.3d 1030 (2001); In re Charles, 135 Wn.2d 239, 249-50, 955 P.2d 798 (1998). If the Legislature has failed to identify the unit of prosecution, or the statute is ambiguous, it must be construed in the defendant's favor. In re Restraint of Hopkins, 137 Wn.2d 897, 901, 976 P.2d 616 (1999); Adel, 136 Wn.2d at 634-35 (citing Bell v. United States, 349 U.S. 81, 84, 75 S. Ct. 620, 99 L. Ed. 905 (1955)).

If this Court finds that the tampering statute can reasonably be read to define the unit of prosecution as either each attempt to induce a witness or person to do one of the four listed acts, or as a series of attempts to induce a witness to do one specific listed act, or each attempt to induce a witness to do more than one listed act, then the statute is ambiguous and under the rule of lenity it must construed in Hall's favor.

In this case, the multiple charges for tampering with a witness, based on the series of telephone conversations between Hall and Aquiningoc, a single individual, between March 22 and April 4, 2007, and all pertaining to her anticipated actions surrounding Hall's trial, a single proceeding, must be charged as a single violation of RCW 9A.72.120. This Court should reverse all but one of the tampering with a witness convictions on this basis, and dismiss the surplus charges. Because the surplus charges were used to calculate Hall's offender score (CP 75-84), this Court should also remand for resentencing on the remaining charges.

2. HALL RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

The federal and state constitutions guarantee the right to effective representation of counsel. U.S. Const. Amend. VI; Const. art. 1, § 22 (amend. 10); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). To prevail on a claim of ineffective assistance of counsel, counsel's representation must have been deficient, and the deficient representation must have prejudiced the defendant. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999) (citing Strickland v. Washington, 466 U.S. 668, 686, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)).

Counsel's performance is deficient if it falls below an objective standard of reasonableness. State v. Maurice, 79 Wn. App. 544, 551-52,

903 P.2d 514 (1995). Where counsel's trial conduct cannot be characterized as legitimate trial strategy or tactics, it constitutes ineffective assistance. Maurice, at 552.

Counsel's failure to object to inadmissible and prejudicial evidence can constitute ineffective assistance. See State v. Dawkins, 71 Wn. App. 902, 909, 863 P.2d 124 (1993) (reasoning counsel deficient where he failed to object to highly prejudicial evidence). To prevail on a claim of ineffective assistance of counsel based on a failure to object, the defendant must show (1) the absence of legitimate strategic or tactical reason for not objecting, (2) that the trial court would have sustained the objection if made, and (3) the result of the trial would have differed if the evidence had not been admitted. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

a. Counsel's Failure to Object to Detective Pavlovich's Introduction of Inadmissible Evidence

Witness misconduct generally entails a witness providing intentionally inadmissible and unsolicited testimony or engaging in extraordinary conduct likely to prejudice the trier of fact. See Storey v. Storey, 21 Wn. App. 370, 585 P.2d 183 (1978) (witness purposely injected impermissible testimony to influence the jury), review denied, 91 Wn.2d 1017 (1979); State v. Harstad, 17 Wn. App. 631, 564 P.2d 824 (1977) (witness cried

and embraced one of the defendants), review denied, 89 Wn.2d 1013 (1978).

Detective Pavlovich's actions in displaying the inadmissible bullet was obvious witness misconduct. As the trial court recognized:

> Under the circumstances of this case, I have an abiding belief that that was not an accident. I think he is a very smart, intelligent man testifying, very experienced. He knows that. And I am really concerned when any witness comes in and intentionally tries to evade what are known or should be known rules in court. There is nothing shown to that jury that doesn't go through a process that allows both sides to comment on it first, and the Court makes a ruling. Nothing is shown to the jury other than through that process.

4RP 519.

Given the trial court's concern over the detective's acts, Hall's counsel was in a position to request relief, either in the form of a motion for a mistrial or in the form of a curative instruction. There was no tactical reason for Hall's counsel to not object to this witness's behavior, or to not request relief from the trial court. The record leaves no doubt that the trial court would have sustained an objection had one been raised.

b. Counsel's Failure to Object to Detective Pavlovich's Opinion Testimony on an Ultimate Issue

Detective Pavlovich provided improper opinion testimony on an ultimate issue when he testified concerning his investigation of the burglary, assault, and unlawful possession of a firearm charges. Specifically, he

stated: "I determined that several crimes occurred." 4RP 490. Hall's counsel's failure to object and move to strike the improper opinion testimony constituted deficient performance.

Generally, no witness may offer opinion testimony regarding the guilt of the defendant; such testimony is unfairly prejudicial "because it ... invad[es] the exclusive province of the finder of fact." State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). A witness expresses opinion testimony if he or she testifies to beliefs or ideas rather than the facts at issue. Demery, 144 Wn.2d at 760. A claim of improper opinion testimony may be raised for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). "Manifest error" requires a showing of actual and identifiable prejudice to the defendant's constitutional rights at trial. Kirkman, 159 Wn.2d at 926-27 (citing State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)).

The error here was of constitutional magnitude. Impermissible opinion testimony regarding the defendant's guilt may be reversible error because such evidence violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury.

Demery, 144 Wn.2d at 759; State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

In the case of improper opinion testimony, a defendant demonstrates manifest constitutional error if the record contains "an explicit or almost explicit witness statement on an ultimate issue of fact." Kirkman, 159 Wn.2d at 938. This is precisely the nature of Detective Pavlovich's testimony. He expressly told the jury that in investigating the allegations against Hall, he "determined that several crimes occurred." 4RP 490. Whether or not a crime occurred, based on an analysis of the alleged facts, was the ultimate issue at Hall's trial. Detective Pavlovich's testimony was an explicit opinion on that ultimate issue of fact.

To determine whether a witness has offered improper opinion testimony, an appellate court considers five factors: (1) the type of witness involved; (2) the specific nature of the testimony; (3) the nature of the charges; (4) the type of defense; and (5) the other evidence before the trier of fact. Demery, 144 Wn.2d at 759.

A consideration of these factors reveals that the opinion testimony was improper. Detective Pavlovich is a law enforcement officer. Testimony from a law enforcement officer may be especially prejudicial because an officer's testimony often carries a special aura of reliability.

Demery, 144 Wn.2d at 765. The specific nature of the testimony concerned the detective's investigation of alleged criminal activity, an area of his expertise, and is likely to have been highly influential to the jury, given that the detective engages in such investigations on a daily basis, while most jurors have little experience sorting out the issue of whether a crime occurred. The charges were for burglary and assault in a domestic violence context--again, a type of allegation which police officers are known to investigate regularly. Considering that the defense was one of general denial, the detective's testimony cuts directly against this defense. Finally, the other evidence before the trier of fact was contradictory: neither Salazar nor McKinney were uniformly consistent as to the key facts essential to convict Hall. In this context, the testimony was improper and prejudicial to Hall.

There was therefore no strategic or tactical advantage to be gained by not objecting. Because the police officer's opinion was improper, the trial court would have sustained a timely objection. Because of Pavlovich's position as a law enforcement official, his opinion likely influenced the jury's verdict. Counsel's failure to object constituted ineffective assistance.

c. Counsel's Failure to Object to Evidence Concerning Hall's Criminal History

As recited in the statement of facts, counsel failed to object to testimony concerning Hall's alleged restraining order, booking photo and warrants. Counsel's failure to object was ineffective assistance of counsel. The court's expressed concerns during the sidebar indicate a timely objection would have been sustained. Not only did counsel fail to object to this inadmissible, prejudicial evidence, but counsel himself evidence that Hall was involved in another criminal case and spent time in jail. Although counsel was attempting to show that Hall did not live with Aquiningoc, any reasonable attorney would have moved to redact the documents shown in the photograph to remove the reference to prejudicial facts.

Evidence of Hall's prior criminal history was highly prejudicial, as it depicted Hall as a repeat offender. Courts recognize that evidence of a defendant's other crimes can be so highly prejudicial that, in certain situations, curative instructions are not sufficient to remove the prejudicial effect. State v. Mack, 80 Wn.2d 19, 490 P.2d 1303 (1971); State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968).

Trial counsel should have objected to the testimony and moved to redact the defense exhibit. Each of these instances was an example of ineffective assistance of counsel.

d. Hall Was Prejudiced by the Ineffective Assistance

As a result of trial counsel's repeated silence in the face of improper and prejudicial testimony, and trial counsel's active presentation of an exhibit with similarly prejudicial evidence, Hall was prejudiced. A defendant suffers prejudice where there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694. A "reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, at 694.

As a result of the evidence that was admitted without objection, the jurors were presented with: (1) a bullet used as illustrative evidence that was neither admitted as evidence nor subject to the rules of evidence; (2) a police officer's opinion that "several crimes occurred;" (3) evidence that Hall had a previous "booking photo;" (4) evidence that Salazar had a restraining order against Hall--suggesting a prior history of domestic violence with the primary complaining witness; and (5) photographic evidence of Hall's prior criminal history.

This evidence depicted Hall as a repeat offender, with a history of potential domestic violence against the complaining witness. As such, jurors were much more likely to conclude that Hall was guilty of the

charged offenses. See, e.g., State v. Perrett, 86 Wn. App. 312, 320, 936 P.2d 426 (1997); State v. Bowen, 48 Wn. App. 187, 196, 738 P.2d 316 (1987) ("[I]ntroduction of other acts of misconduct inevitably shifts the jury's attention to the defendant's general propensity for criminality, the forbidden inference ...."). Combined with a detective's assessment that the evidence showed that "several crimes occurred" when Hall went to Salazar's residence on January 14, 2007, this evidence greatly bolstered the state's case against Hall and seriously undermined his defense of denial.

Counsel's actions create a probability, sufficient to undermine confidence in the outcome of the trial, that the result of the proceeding would have been different but for counsel's actions and inaction. Strickland, 466 U.S. at 694.

D. CONCLUSION

Because Hall was charged and convicted for multiple counts of tampering with a witness, where the Legislature intended only one, all but one of these convictions should be reversed and dismissed, and the cause remanded for resentencing based on a corrected offender score. Because Hall received ineffective assistance of counsel, and because the cumulative

effect of counsel's deficient performance at trial deprived Hall of a fair trial, his remaining convictions should also be reversed.

DATED this 21st day of February, 2008.

Respectfully submitted,

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